Supreme Court, U.S.
FILED
AUG 7 - 2003
OFFICE OF THE CLERK

(3)

No. 03-21

IN THE

Supreme Court of the United States

CHAUNCE WINDLE,

Petitioner,

v.

CITY OF MARION, INDIANA, a municipal corporation, CITY OF MARION, INDIANA POLICE DEPARTMENT, and ROB RAYMER, SERGEANT, in his official and individual capacity,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PETER CAMPBELL KING *
CLINE, KING & KING, P.C.
1015 Third Street
Post Office Box 250
Columbus, Indiana 47202
(812) 372-8461

* Counsel of Record

Attorney for the Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

17 PP

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
THE UNDERLYING FACTS	1
REASONS FOR GRANTING THE WRIT	3
I. THERE IS A CONFLICT AMONG THE CIRCUITS CONCERNING WHEN THE GOVERNMENT MAY BE HELD LIABLE FOR A "STATE-CREATED DANGER."	3
A. The facts of *Windle* are distinguishable from the facts of *DeShaney*.	3
B. The Circuit split in applying the state created danger theory is significant and should be addressed by this Court.	4
II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF APPEALS ERRED IN DENYING LIABILITY FOR CONDUCT BY GOVERNMENT OFFICERS THAT WAS DELIBERATELY INDIFFERENT AND CONSCIENCE SHOCKING	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
City of Los Angeles v. Heller, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986)	8
County of Sacramento v. Lewis, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)	9
DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 421 (2001)	1, 7
Hernandez v. City of Goshen et al., 324 F.3d 535 (7th Cir. 2003)	5, 6
McClendon v. City of Columbia, 305 F.3d 314 (5th Cir. 2002)(en banc), *cert. denied*, __ U.S. __, 123 S.Ct. 1355, 155 L.Ed.2d (2003)	5
Speer v. City of Wynne, 276 F.3d 980 (8th Cir. 2002)	9
Windle v. City of Marion, et al., 321 F.3d 658 (7th Cir. 2003)	4

INTRODUCTION

When this Court established the state created danger theory in its decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 421 (2001), the Court provided lower courts with no guidance for applying the theory. Circuit Courts of Appeal have embraced the theory and have established tests to determine whether the state has created or enhanced danger to a plaintiff in a 42 U.S.C. § 1983 action. Left to their own devices, the Circuit Courts developed tests that vary among the Circuits. As a result, justice for plaintiffs in § 1983 actions depends on the location of the plaintiff's domicile. Under the same set of facts, and because of the varying tests, justice had in one Circuit could elude a plaintiff in another Circuit. This Honorable Court should grant Petitioner, Chaunce Windle's (hereinafter "Chaunce") Petition for Writ of Certiorari to resolve this split among the Circuits and decide an important, yet unresolved, question of constitutional law.

THE UNDERLYING FACTS

This action arises out of the sexual and emotional abuse of a child, Chaunce. She was being sexually abused by Carol Rigsbee (hereinafter "Rigsbee"), her middle school teacher. Rigsbee frequently called Chaunce and had sexually explicit conversations with the child. Police officers on the City of Marion, Indiana Police Department intercepted these calls and listened to them for entertainment purposes. When officers knew Chaunce's name and that the abuser was a Jones Middle School teacher, they did not act to end the abuse. To the contrary, officers took affirmative actions that prevented assistance for Chaunce. Not until they heard her mention suicide or running away, did the officers intervene and end the abuse.

Respondents urge this Court to consider only the actions of Sergeant Raymer (hereinafter "Raymer") in this case. The Respondents' argument that only Raymer's acts should be considered by this Court, because he was the only officer

named individually, is misguided. The caption to this case names the City of Marion, Indiana Police Department; therefore, this Court should consider the actions of all of the Department's officers that increased the harm to Chaunce.

Lieutenant Andrea Alter-Dunn acted affirmatively when she told a subordinate officer, Gary Henderson, that there was nothing they could do to help Chaunce because the information was received through illegal intercept. Officer Henderson testified that he felt Lt. Alter-Dunn's words were a Department directive not to intervene despite the fact that he felt Chaunce was in a position of being harmed by Rigsbee's sexual abuse. Ultimately, the directive from Lt. Alter-Dunn enhanced the danger Chaunce faced.

Even if this Court ignores the affirmative acts of Lt. Alter-Dunn and focuses solely on the affirmative acts of Raymer, Chaunce's Petition for Writ of Certiorari should be granted. Raymer acted outside Department protocol for investigating a suspected child abuse situation by conducting his own "private investigation." Raymer did not file a report of his suspicions of child abuse immediately as required by the Department. In fact, former City of Marion, Indiana Chief of Police, David Homer, testified that Raymer was disciplined for "withholding, mishandling, misuse or removal of official records, information or evidence without prior authorization." Dep. of David Homer, August 9, 2001, pg. 29, lns. 12-14.

To argue that there were no affirmative acts that enhanced the danger to Chaunce denies the testimony of Ann Presnall, a therapist experienced in counseling child victims of sexual abuse, who counseled Chaunce following her abuse. Ms. Presnall was adamant in her testimony that each exposure to Rigsbee, was more harmful to Chaunce:

> My opinion about that is that in my training and through conferences and workshops what we have learned is that exposing a child to a perpetrator when there has not been any clinical intervention, legal intervention, that many times that perpetrator is trying to continue that relation-

> ship that is destructive to the child and it's not just the sexual acts that are destructive. It's the emotional manipulation that is really destructive to the kid and that is what was going on in that situation and that was very difficult for Chaunce. It was harmful to her.

Deposition testimony of Ann Presnall, January 10, 2002, pg. 65, lns. 15-25, (objection, "foundation").

Ms. Presnall further testified about the increased danger and harm to Chaunce that occurred as a result of Respondents' actions:

> My opinion is that with repeated exposure to the individual who perpetrated upon Chaunce that there was, again, the heightened state of arousal that Chaunce experienced during the conversations, the anxiety, nightmares, feelings of helplessness, hopelessness that those continued and again caused her harm.

Deposition testimony of Ann Presnall, January 10, 2002, pg. 76, lns. 16-22, (over objection, "vague"). According to Ms. Presnall's testimony, the Respondents' affirmative acts allowed Rigsbee continued exposure to Chaunce, and therefore, enhanced the child's danger.

Ms. Presnall's uncontroverted testimony was referenced substantially throughout Chaunce's briefing, and her testimony was provided as exhibits for the District Court and for the Seventh Circuit. Pointedly, neither Respondents, the District Court, nor the Seventh Circuit have acknowledged Ms. Presnall's testimony.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT AMONG THE CIRCUITS CONCERNING WHEN THE GOVERNMENT MAY BE HELD LIABLE FOR A "STATE-CREATED DANGER."

A. The facts of *Windle* are distinguishable from the facts of *DeShaney*.

Respondents, as well as other governmental defendants, would have this Court believe that the mere invocation

"*DeShaney*" is a complete bar of a Plaintiff's claim against police officers and departments for a substantive due process violation under 42 U.S.C. §1983. However, the situation in *Windle* is distinguishable from *DeShaney*. First, there is a difference in terms of the awareness of the government officers as to the danger to the child. The Seventh Circuit noted that the State actors in *DeShaney* "may have been aware that a child was being abused." *Windle v. City of Marion, et al.*, 321 F.3d 658, 662 (7th Cir. 2003). Under the facts in *Windle*, there is no question that the Respondents knew Chaunce was being abused. It is not enough for Respondents to invoke *DeShaney* and for the courts to say the facts of *Windle* are indistinguishable.

Second, in this case and unlike *DeShaney*, the state has created and/or enhanced the danger Chaunce faced. As discussed above, government officers took affirmative actions to prevent investigation of the case and protect Chaunce. Thus, *Windle* poses important questions not resolved by *DeShaney*, namely: whether due process is violated when government officials, to the great harm of a child, unquestionably know of a danger and take affirmative steps to ensure that the danger is not addressed.

B. The Circuit split in applying the state created danger theory is significant and should be addressed by this Court.

In their discussion of the various tests applied by Circuit courts, Respondents acknowledge the split in the Circuits. Respondents' Brief in Opposition, pg. 9. The various tests Circuits utilize to make this outcome-determinative decision are more than "slightly different" as Respondents assert. Respondents try to argue that Chaunce would lose under the various tests in other Circuits, but this argument misses the key and relevant point to granting Chaunce's Petition. In her Petition, Chaunce asks this Court to address the Circuit split regarding a key constitutional issue. However, in response to Respondents' argument and contrary to their assertion,

Chaunce clearly would prevail under the tests of Circuits other than the Seventh.

Regarding the test applied by the Fifth Circuit, Respondents argue that Chaunce ignored the "significant hurdles" necessary to prove the state actors acted with deliberate indifference, the second prong of the Circuit's two-prong test for state created danger. Respondents' Brief in Opposition, pg. 14. In support of this argument, Respondents rely upon *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002)(en banc), *cert. denied*, __ U.S. __, 123 S.Ct. 1355, 155 L.Ed.2d (2003). Respondents quote *McClendon* by stating:

> To establish deliberate indifference, a state actor must know of and disregard an excessive risk to the [victim's] health and safety. The state actor's actual knowledge is critical to the inquiry. A state actor's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, does not rise to the level of deliberate indifference.

McClendon, 305 F.3d at 326.

This language quoted by Respondents shows exactly why Chaunce should prevail under the Fifth Circuit's test. Raymer and other officers knew of the harm Chaunce endured. Even the Seventh Circuit has now acknowledged that the police officers knew of the danger Chaunce faced, and that they did not intervene until she had reached a crisis point two months after officers were aware of the abuse. In *Hernandez v. City of Goshen et al.*, the Seventh Circuit found:

> In *Windle* we found no § 1983 liability where police officers learned of potential danger to the plaintiff, Chaunce Windle, by listening to conversations between her and her sexual abuser over a police scanner but did not investigate the situation or act to prevent further abuse for a period of about two months. *Id.*, 2003 U.S. App. LEXIS 3880 at 3, 2003 WL 728964, at *2. We said in *Windle* that, just as the social workers in *DeShaney* knew that Joshua DeShaney's father was abusing him but did not stop the abuse, the mere fact that

> the officers knew that Chaunce Windle faced danger but did not intervene until the situation reached crisis did not mean that the officers created the danger or made it worse for the purpose of imposing § 1983 liability. *Windle*, 2003 U.S. App. LEXIS 3880 at 5, 2003 WL 728964, at *2.

324 F.3d 535, 538-539 (7th Cir. 2003). By finding the officers did not respond for two months and noting the officers were aware of the danger Chaunce faced and endured, the Seventh Circuit has acknowledged facts that justify a finding of a constitutional violation under the two-pronged test of the Fifth Circuit because Respondents acted with deliberate indifference.

In their discussion of the Tenth Circuit test for state created danger, Respondents argue that the test "requires at the very least, a high level of outrageousness." Respondents' Brief in Opposition, pg. 12, citing *Uhlrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995), *cert. denied*, 516 U.S. 1118, 116 S.Ct. 924, 133 L.Ed.2d 853 (1996). The facts of this case are outrageous. Police officers eavesdropped on Chaunce's sexual abuse for entertainment purposes, took affirmative steps to prevent fellow officers from intervening on her behalf, and enhanced the danger to Chaunce to the point that she was willing to commit suicide before they ended her abuse. The fact that officers intervened when they believed Chaunce would kill herself indicates that they were aware that the danger she faced had been enhanced and had escalated. It is outrageous to common sensibilities, and should be to the judicial conscience, to contemplate that those who purport to "protect and serve" are entertained by a child's suffering so much so that they would prevent fellow officers from ending the sexual abuse by helping the child.

Additionally, in their discussion of the Tenth Circuit test for state created danger, Respondents argue that, "Sgt. Raymer did not create or exacerbate any danger to Windle because she was in 'no worse position than [she] would have

been had [defendants] not acted at all.' *DeShaney*, 489 U.S. at 201, 109 S.Ct. at 1006." Respondents' Brief in Opposition, pg. 13. Certainly, this is not the case. Consider again the testimony of therapist, Ann Presnall:

> My opinion is that with repeated exposure to the individual who perpetrated upon Chaunce that there was, again, the heightened state of arousal that Chaunce experienced during the conversations, the anxiety, nightmares, feelings of helplessness, hopelessness that those continued and again caused her harm.

Deposition testimony of Ann Presnall, January 10, 2002, pg. 76, lns. 16-22, (over objection, "vague").

Raymer conducted an unauthorized "private investigation" rather than following Department protocol which required making an official police report of the incident. Had he made such a report, Chaunce's abuse would have ended much sooner. Raymer's "private investigation" served to exacerbate the danger Chaunce faced.

Respondents have acknowledged that exposure to a sexual abuser is harmful. Lt. Alter-Dunn testified to this fact during her deposition taken on August 9, 2001. Therefore, Respondents' actions did leave Chaunce in a worse position than she would have been had they not acted at all. *DeShaney*, 489 U.S. at 201.

The tests used by the Circuit Courts of Appeal to determine a state created danger claim are varied to the extent that the outcome of such a claim is dependant upon the Circuit in which a claim is filed. Although this Court spawned the State Created Danger Theory in its *DeShaney* opinion, the United States Supreme Court is yet to provide guidance to lower courts for application of the Theory. For this reason, Chaunce's Petition for Writ of Certiorari should be granted.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF APPEALS ERRED IN DENYING LIABILITY FOR CONDUCT BY GOVERNMENT OFFICERS THAT WAS DELIBERATELY INDIFFERENT AND CONSCIENCE SHOCKING.

Respondents begin their argument of this issue by stating the Seventh Circuit finding is correct that Chaunce suffered no constitutional violation by the City of Marion because there was no underlying constitutional violation by Raymer. Respondents base this assertion on *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986). Specifically, Respondents cite this Court's holding in *Heller* that "a municipality cannot be held liable for an official policy or custom if it has been determined that the individual defendant did not violate the plaintiff's constitutional rights." Respondents' Brief in Opposition, pg. 17, citing *Heller*, 475 U.S. at 799.

The *Heller* opinion is, however, drawn into question by a strong dissenting opinion. In his dissent, Justice Stevens stated:

> The Court mistakenly assumes that there was a necessary inconsistency between the verdict of no liability against the individual officer and a possible verdict against the municipal defendants; it then mistakenly assumes that dismissal was an appropriate response to the perceived inconsistency. Perhaps not coincidentally, the Court achieves these results without the aid of briefs or argument, and relies on an anonymous author to explain what it has done.

Heller, 475 U.S. at 808.

There is, however, significant uncertainty and conflict in the lower courts as to when *Heller* precludes a suit against a city if individual officers have been held not liable. Lower courts have questioned and refused to follow the holding in *Heller*. The Eighth Circuit addressed the holding of *Heller* by finding:

> Our court has previously rejected the argument that *Heller* establishes a rule that there must be a finding that a municipal employee is liable in his individual capacity as a predicate to municipal liability. *See Praprotnik v. City of St. Louis*, 798 F.2d 1168, 1172-73 n. 3 (8th Cir. 1986), *rev'd on other grounds*, U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *see also Parrish v. Luckie*, 963 F.2d 201, 207 (8th Cir. 1992) ("A public entity or supervisory official may be liable under § 1983, even though no government individuals were personally liable.")

Speer v. City of Wynne, 276 F.3d 980, 985-86 (8th Cir. 2002).

The *Speer* court also found that municipal liability may arise based upon the combined actions of multiple officials even though no one individual's actions rise to the level of constitutional violation. *Id.* at 986. While Chaunce in no way concedes that Raymer did not violate her constitutional rights, under the decisions cited above, it is also possible to find municipal liability based upon the combined actions of the Respondents, including employees of the City of Marion and the City of Marion Police Department who were not individually named.

Next, Respondents argue that *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) does not apply to *Windle*. However, the key factor in the determination of whether an act is conscience shocking or demonstrative of deliberate indifference is the actor's opportunity to deliberate. *Lewis* 523 U.S. at 851. The "ability to deliberate" aspect of the determination of whether an action is conscience shocking is as relevant to a police pursuit as it is in the matter at hand. Here, as the Seventh Circuit found, Respondents had two months to deliberate their actions. *Windle*, 321 F.3d at 660. Yet, Respondents took no action to end the abuse; rather, they took deliberate actions that prolonged Chauce's suffering.

In their discussion of *Lewis*, Respondents state that only government action that intends to injure rises to the level of

conscience shocking. Further, they argue that Chaunce has provided no evidence that Respondents had any deliberate intent to injure. The Seventh Circuit acknowledged that Respondents listened to the sexual abuse of Chaunce when things were slow on night shift and that they listened for entertainment purposes. Officers knew that a child was being sexually abused which was harmful. They knew Chaunce's name and that the abuser was a teacher at Jones Middle School. Respondents' intent must have been to harm if they took affirmative acts to discourage fellow officers from intervening, an act that would have immediately ended their perverse nighttime entertainment. Respondents literally chose their own entertainment over protecting a child. The intent to harm is evident in the facts.

This Court should grant certiorari to review the *Windle* decision. In today's society, where horrific instances of child abuse are continually in the evening news, do we, as a Nation, want our law to deny justice to sexually abused children where police officers know of the danger a child faces and take actions that prevent others from helping until the child reaches crisis? In Chaunce's case, the Respondents only intervened when they had allowed the danger she faced to increase to the point where they heard her mention running away from home or committing suicide. It took Respondents at least two months of listening to the abuse to decide to intervene. Must sexually abused children die at their own hands before our Nation's courts hold police officers accountable for not intervening to help, or worse, as in Chaunce's case, for taking affirmative actions to prevent anyone else from intervening?

CONCLUSION

This Court should grant this Petition and directly address the test applied to determine whether the state created a Plaintiff's danger and whether the actions of Respondents were conscience shocking and deliberately indifferent to the plight of a sexually abused child.

Respectfully submitted,

PETER CAMPBELL KING *
CLINE, KING & KING, P.C.
1015 Third Street
Post Office Box 250
Columbus, Indiana 47202
(812) 372-8461

* Counsel of Record

Attorney for the Petitioner